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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SOUTH PACIFIC SHIPPING CO. LTD
(d/b/a Ecuadorian Line) and PACIFIC FRUIT, INC.

Case No. 07 Civ. 06317 (GEL)

Plaintiffs,

- against -

NEW YORK CONTAINER TERMINAL, INC.

Defendant.
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**DECLARATION OF
PATRICK E. BRECHT**

PATRICK E. BRECHT declares as follows:

1. I am the founder and President of P.E.B. Commodities, Inc, an international service company located in Petaluma, CA that specializes in consultation and forensics, in the handling, packing, storing and transporting of perishable products.
2. I submit this Declaration in Opposition to Plaintiffs' Motion for a Preliminary Injunction.
3. I am considered an authority in the handling, packing, storing and transporting of perishable products.
4. I obtained a Ph.D in 1973 from the University of California, Davis in Plant Physiology with emphasis in Postharvest Biotechnology.

5. I served as a professor of Plant Physiology at Cornell University from 1973 to 1976.

6. I have been the President of PEB Commodities, Inc from 1994 to present. From 1994 to 1997, I was President of Special Commodities Services, LLC. I served as co-manager and co-founder of Unifresh, LLC (now BV Fresh), an Internet based global inspection and surveying company specializing in perishable products from 1998 to 2003.

7. From 1981 to 1994, I served as Director of Special Commodities at American President Lines (“APL”). At APL, I managed all aspects of the company’s international refrigerated cargo transportation businesses with annual revenues of over \$200 million. This involved partnership with suppliers, shippers, associations, media, government officials, military, regulators, underwriters, transportation companies and importers. While at APL, I also served as the head of APL’s domestic refrigerated services company, American President Specialized Commodities. In this position, I directed the start up and operation of the first domestic refrigerated intermodal stack train service in the world. I also pioneered and introduced various innovations, including computerized refrigerated containers.

8. From 1978 to 1981 I served as Corporate Director of Quality at United Brands (now Chiquita Brands), a multinational \$4.5 billion company. In this position, I managed worldwide quality assurance for all subsidiary companies, and directed international and domestic quality control operations involving growing, harvesting, packing, transporting, and marketing of perishable products including fresh boxed bananas.

9. From 1976 to 1978 I was Corporate Director of Perishable Commodities and Product Development for SeaLand Service Inc., a multinational transportation company with services throughout the world.

10. I am the author or joint author of several books and publications concerning the shipping of perishable goods. These include Shipping Special Commodities, Marine Container Transport of Chilled Perishable Produce, Refrigerated Trailer Transport of Perishable Products and Air Transport of Perishable Products. These books offer guidance for packaging, loading, storage and transport of perishable products and for the proper use of refrigerated equipment as well as trouble-shooting causes of poor-quality products transported by air, land and sea.

11. My CV, court testimonies, depositions and a full list of the all publications that I have authored or co-authored are attached as Group Exhibit 1.

12. I have testified at trial or by deposition as an expert witness in 14 cases in the last five years.

13. Additionally, I have served as an expert witness in roughly a 100 cases in the last 5 years in which I did not testify at trial or deposition.

14. Moreover, I have served as an expert witness in 17 cases involving bananas in which I did not testify at trial or deposition.

15. I have served as a principal consultant for over 200 perishable product and equipment projects in the last 5 years.

16. I have presented workshops on perishable products and refrigerated technology in Australia, Asia, North America, Hawaii, Europe and South America.

17. I have been asked to give my opinion on several topics in dispute in this matter.

18. I am being compensated for my services in this matter at a rate of \$195.00/hr for consultation services and \$275/hr for testimony.

19. First, I have been asked to give my opinion on the identical statement made by (a) Mr. Kevin Horvath, Vice President of Ecuadorian Line, and (b) Mr. Carlos Aguirre, President of Pacific Fruit and Ecuadorian Line, in their July 10, 2007 Declarations submitted to this Court.

20. Mr. Horvath (in Paragraph 11 of his Declaration) and Mr. Aguirre (in Paragraph 13 of his Declaration) state:

“Under the Stevedoring Contract, NYCT guarantees to provide South Pacific’s vessels a berth and related stevedoring services at NYCT’s terminal at Staten Island, New York, on each Wednesday, Thursday and Friday. These are the days required for discharge of Pacific Fruit’s fruit cargo based on the schedule for harvesting and loading the bananas and other fruit in Ecuador and the duration of the voyage to New York.”

21. The implication from this statement made by both Mr. Horvath and Mr. Aguirre is that a Wednesday, Thursday or Friday vessel berthing by South Pacific’s vessels is somehow necessary or mandated because of (1) the short window of time in which the bananas can be harvested; (2) the short “green life” for bananas after harvesting, or (3) some combination of both.

22. In fact, bananas are a fruit with both a moderately wide window of time in which they can be harvested and a relatively long green life.

23. Commercially, bananas must be harvested while mature green and transported to destination markets under refrigeration where they are subsequently ripened under controlled conditions.

24. The appropriate maturity for cutting (“harvesting”) bananas depends on the cultivar and duration of the voyage. The width of a certain banana finger on a specific hand of fruit from the stem of fruit being measured for harvest determines the maturity and if that plant will be harvested. The diameter of the middle of the outside fingers of a given hand of bananas gives the grade.

25. It is common practice for a bag to be tied with a colored ribbon at the top of each stem of bananas to identify the scheduled harvest week^{1,2,3}. Bananas can be harvested at any point within a 3-week window, although in reality, they are normally harvested over a 5-week window⁴.

26. Bananas destined for overseas markets are harvested and shipped green. Harvesting bananas earlier than normal can increase the green life by three to five days. Harvest time represents a compromise between leaving the fruit on the plant long enough to maximize yield, but harvesting it soon enough so that sufficient green life remains to market the fruit with acceptable quality. The stage of maturity for harvesting the fruit depends on the market for which it is intended and is determined in terms of the green life required. For example, Ecuadorian Cavendish bananas destined for the eastern USA could be harvested at a grade of 44-46 (the diameter in 1/32”) whereas the same fruit

¹ The maturity of bananas can be measured by counting the number of days from shooting. The bananas are harvested according to their age and maturity about 12 weeks after bagging.

² Stems average 150 fingers and weigh 85 to 100 pounds each. On each stem, ten or more bananas growing together are called ‘hands’ and a single banana is called a ‘finger’. Four to six bananas sold in the retail store are called a ‘cluster’.

³ Two workers harvest the bananas: a ‘cutter’ and a ‘backer’. The cutter cuts down the plant with his machete while the backer waits for the cut stem to settle on a thick cushion on his shoulder. Once a stem is removed, the main plant is cut away and the daughter becomes the main plant and repeats the cycle. The backer carries the fruit and attaches it to a nearby overhead cableway where the stem is transported to a boxing station.

⁴ The ‘bagging’ practice described above will correctly identify about 90-95% of the banana plants’ age within this 3-week window. However, due to normal growing variation and human error during the bagging process, 5-10% of the banana plants in any given farm (“plantation”) will be incorrectly bagged (identified), thus the 5-week window.

intended for the Mediterranean would be picked at a thinner grade (grade 41-43) because the fruit must withstand a longer voyage.

27. In Ecuador, the bananas are grown by hundreds of growers. Because of these circumstances there is substantial latitude in procuring bananas for export during various time frames.

28. Bananas are refrigerated after they are harvested and before loading, during the period that they are laden onboard South Pacific's vessels, and, after they are unloaded at New York Container Terminal ("NYCT"), when they are stored in the refrigerated banana cold storage facility or in refrigerated containers. The bananas are typically transported to banana ripening facilities in refrigerated trailers or containers.

29. The geographic source of bananas imported by Pacific Fruit and carried on the vessel of its affiliate Ecuadorian Line is principally Ecuador.

30. The journey from Ecuador to New York, according to the published Ecuadorian Lines sailing schedule, takes South Pacific's vessels about 7 days. After the bananas are offloaded from the vessel in New York, it returns to Ecuador.

31. Ecuadorian bananas that are shipped to the USA using normal and customary 'USA' packing methods can last, with proper refrigeration and treatment, about 21 days. The use of controlled atmospheres during transit could double the green life of the bananas⁵.

⁵ The precise management of altered levels of oxygen ("O₂") and carbon dioxide ("CO₂") levels in the environment surrounding the fruit is called controlled atmosphere ("CA"). For bananas the preferred CA environment is 2-5% O₂ and 2-5% CO₂

32. The green life of the bananas is sufficient to permit the fruit to remain in cold storage at the NYCT up to 1 ½ weeks. This is best illustrated by Pacific Fruit's practice of holding bananas in the NYCT cold storage up to 11 days (see Exhibit 2).

33. There is also flexibility in the time required for ripening bananas. The ripening time can be shortened or extended to meet logistics and market requirements by simply adjusting the ripening temperature. The ripening cycle can be as short as 4 days (> 64 F) or as long as 8 days (at 57 F)

34. In my expert opinion and based on the foregoing, there is considerable flexibility in the handling, distributing and marketing of bananas, given (1) a typical 21-day green life (2) the 7-day transit from Ecuador to New York, (3) the ability to increase or decrease the green life of the bananas by adjusting the stage of maturity at harvest, (4) the 3-week harvest window in the tropics and (5) the option and ongoing practice by Pacific Fruit of holding bananas in the NYCT cold storage up to 11 days.

35. It is my opinion based on personal experience and published research that the use of modified atmosphere packaging ("MAP") or controlled atmosphere would significantly increase the green life of the bananas. Although this option exists, it would represent an added cost to Pacific Fruit.

36. In my expert opinion and based on the foregoing, Pacific Fruit could adjust the harvest or shift the fruit harvested up to several days earlier to vessels destined to NYCT in order for South Pacific's vessels to arrive at NYCT on a Tuesday or a Wednesday. Since the fruit on board the vessel would be the same 'age' as that for the current load schedule, there would be no harm to the bananas and no loss of green life.

37. I have also been asked to give my opinion on whether Pacific Fruit's bananas would be harmed if, instead of being unloaded at NYCT within a two-day period, they were unloaded over a three- to five-day period.

38. In my expert opinion and based on the foregoing, there would be no harm to the bananas if they are held under proper refrigeration and unloaded over a three- to five-day period as opposed to a two-day period.

39. From the information provided to me regarding the case, I make the aforementioned opinions. These opinions are based on the information provided to me at the time of the writing of this declaration. Additional information provided or developed by either party subsequent to the writing of this affidavit may alter the opinions and conclusions herein expressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Petaluma, CA, on August 5, 2007.



Patrick E. Brecht

Group Exhibit 1

Patrick Brecht, Ph.D.

Deposition & Court List

CV

Publications



4733 Bodega Avenue, Petaluma, CA 94952 Phone (707) 775-3100 Fax (707) 775-3232

Dr. Patrick E. Brecht
DEPOSITION & COURT LIST
2001 to 2006

So. Valley Cherry Growers v Dole.	Arbitration 2004
Gilbert Marroquin v Douglas J Fano	Court Testimony 2002
FarmGate v El Camino Packing	Arbitration 2002
DiMare v Zurich	Arbitration 2002
Allianz v RE Garrison Trucking	Deposition 2001
Donovan Enterprises v ThermoKing	Deposition 2001
Admiralty Island Fisheries v Sea Trade	Deposition & Court Testimony 2005
Stevco v Gainesborough	Court Testimony 2006
DiMare v Imperial Irrigation, et al	Deposition 2003
Clearwater Foods v Day & Ross	Deposition 2005
Fireman's Fund v Evergreen Marine	Deposition 2004
Gold Kist v PM&O	Court Testimony 2005
Maxco v Pavich Family Farms	Deposition 2002
American Home Assurance v Merck	Deposition 2005

PATRICK E. BRECHT
4733 Bodega Avenue
Petaluma, California 94952
Phone (707) 775-3131
Fax (707) 775-3232

BUSINESS EXPERIENCE AND ACHIEVEMENTS

P.E.B. COMMODITIES, Inc. **PRESIDENT** **1994-Present**
Petaluma, California

Accountable for the start up, growth and management of international companies that specialize in perishable commodities from field to retail store. P.E.B. Commodities, Inc. offers consultation services, workshops and forensics and expert services for domestic and international customers. The Companies' forte is perishable product forensics, training, refrigerated technology applications, market development and quality assurance.

Selected activities and accomplishments follow:

- Principal investigator and expert for more than 200 perishable product losses involving fruit, vegetables, meat, seafood, grains, beverages, blood plasma, live plants, packaging, cold storage, controlled atmosphere & refrigerated equipment in past six (6) years
- Organizer and senior instructor at numerous international and domestic refrigerated cargo workshops dealing with refrigeration technologies, fruit, vegetables, meat, seafood and other perishable products
- Principal consultant for development of expert systems and subsystems for refrigeration technologies and for commercial application of new truck and container refrigerated technologies
- Jointly authored *Marine Container Transport of Chilled Perishable Produce*, *Refrigerated Trailer Transport of Perishable Products* and *Air Transport of Perishable Products*
- Co-author of a Perishable Commodities Handling Guide Book
- Formerly, a principal member of NPLA-RTF Food Safety Task Force.
- Food safety guest speaker at ten (10) conferences dealing with HACCP, distribution and transportation of perishables.
- Created Highly Protected Risk (HPR) insurance program for perishable shippers & buyers

UNIFRESH, L.L.C. CO-MANAGER & CO-FOUNDER **1998-2003**
San Francisco, California. Jointly pioneered the start up and development of Unifresh (now BVfresh), an Internet based company that provides perishable cargo surveying & inspections services to international customers.

BUSINESS EXPERIENCE AND ACHIEVEMENTS

(Continued)

AMERICAN PRESIDENT LINES, LTD.
Oakland, California

DIRECTOR **1981 - 1994**
Special Commodities Services

Accountable for system wide management of American President Lines Special Commodities business units with annual revenues of \$210 million and assets valued at \$250 million. Wrote the book *Shipping Special Commodities* and while running American President Lines international and domestic perishable commodities businesses, he pioneered scores of new markets for perishables and set up “cold chain” processes for many businesses and governments. He headed the team that developed and introduced the first computerized reefers into international trade.

American President Lines was the largest container transportation company in the Pacific basin with sales of \$2 billion annually and services throughout Asia and North America.

- Directed international refrigerated container business . . . optimized net revenue contribution and asset management, provided consultation services worldwide, acquired \$50 million in assets, developed new businesses with annual revenues of 21 million dollars, instituted customer driven market strategies . . . result was over 200% growth over a 5-year period and most profitable business at American President Lines.
- Headed American President Special Commodities Company, a wholly owned subsidiary of American President Companies, . . . instituted companies mission and strategy, streamlined organization, retired non-profitable assets . . . result was effective transition to profitable business.
- Pioneered and introduced first domestic refrigerated container stack train company . . . formulated business plan, identified customer needs, developed \$20 million acquisition package, set up and ran the company . . . result was highly profitable, customer oriented business.

UNITED BRANDS COMPANY
New York, New York

CORPORATE DIRECTOR **1978 - 1981**
Quality & Development

Responsible for worldwide management of domestic and international divisions consisting of 286 employees for this \$3.8 billion foods company with operations in 21 countries. Accountable for Quality Control of Chiquita, Sun World, UB Floriculture, Morrell Meat and others.

- Introduced and managed an innovative Quality program . . . fortified management team, established a source point analysis system, involved 10,000 employees . . . result was an estimated \$5.5 million savings in first year and consistent product quality.

BUSINESS EXPERIENCE AND ACHIEVEMENTS

(Continued)

- Directed key technical activities associated with 3 new ventures . . . resolved major impediments, minimized uncertainties . . . result was successful and profitable new businesses.
- Instituted a manpower development program . . . structured succession planning process, implemented periodic results oriented performance reviews . . . result was significant improvement in employee performance and reduction of turnover from 35% to nil.

SEA-LAND SERVICE, INC.
R.J. REYNOLDS INDUSTRIES
 Elizabeth, New Jersey

CORPORATE DIRECTOR
Product Development

1976 - 1978

Accountable for management of multiproduct development department and perishable commodities business for one of the world's largest container shipping company with sales of \$1 billion and services in 53 nations.

- Established first Product Development Group and fully automated and computerized research mobile laboratory in the container steamship industry . . . set up an effective organization, established needs and action plans, recruited and developed staff . . . outcome was clearly defined program with estimated \$34 million impact on corporate revenues.
- Instituted \$75,000 grant programs with 3 universities . . . developed strategic business goals, negotiated grants, managed programs, monitored findings . . . result was cost-effective performance specifications and requirements for transportation food products.

CORNELL UNIVERSITY
Ithaca, New York

ASSISTANT PROFESSOR
Food Science & Vegetable Crops

1973 - 1976

Faculty member in vegetable crops, food science and international agriculture. Directed research programs in nutrition, food chemistry and postharvest biotechnology.

- Established highly productive research team . . . set up new laboratories . . . published 20 articles in prominent scientific and consumer publications . . . contributed new advances in genetic engineering and preservation, organoleptic and nutritional quality and chemical composition of fresh and processed food products.
- Contracted the largest industry grant at Cornell University's College of Agriculture with General Foods Corporation . . . directed 16 doctoral and masters students . . . taught graduate and undergraduate courses in postharvest biotechnology and food chemistry.

BUSINESS EXPERIENCE AND ACHIEVEMENTS

(Continued)

Following positions were held concurrently while working full-time on a Ph.D. program:

- Lecturer & Laboratory Instructor, American River College, Sacramento, California, 1971-1972
- Research Assistant, University of California, Davis
1970 - 1973
- Lecturer & Laboratory Instructor, California State University, Sacramento
1969 - 1970
- Laboratory Instructor & Student Assistant, California State University, Los Angeles
1968 - 1969

EDUCATION

1973 - Ph.D., Plant Physiology, University of California, Davis; 1969 - MA, Botany, California State University, Los Angeles; 1968 - BA, Biological Science, Whittier College, Whittier, California.



Commodities, Inc.

PUBLICATIONS

Patrick E. Brecht, Ph.D

Birnbaum, NR, Hicks, JR, Tabacchi, MH, and Brecht, PE. Evaluation of evacuated packages as an alternative to blanching for frozen spinach. J Food Sci. 44(2) 404.

Bisogni, CA, Armbruster, G and Brecht, PE. 1976. Quality comparisons of room ripened and field ripened tomato fruits. J Food Sci. 41:333-338.

Brecht, PE. 1973. Physiological studies of brown stain, a form of CO₂ injury of harvested lettuce. Ph.D. Thesis, Univ. of California, Davis.

Brecht, PE. 1980. Use of controlled atmosphere to retard deterioration of produce. Food Technology. pp. 45-50

Brecht, PE. 1986. A Handbook on Shipping Perishable Commodities.

Brecht, PE. 1992. Shipping Special Commodities.

Brecht, PE. 2001. Food Safety & Transportation. London Market News. Vol. XVIII No.1.

Brecht, PE. 2001. Refrigeration Technology to the Rescue. London Market News. Vol. XVIII No. 1.

Brecht, PE, Keng, L, Bisogni, CA, and Munger, HM. 1976. Effect of fruit portion, stage of ripeness and growth habit on chemical composition of fresh tomatoes. J Food Sci. 41:945-948.

Brecht, PE, Kader, AA, and Morris, LL. 1973a. The effect of composition of the atmosphere and duration of exposure on brown stain of lettuce. J. Am. Soc. Hort. Sci. 98:536.

Brecht, PE, Kader, AA, and Morris, LL. 1973b. Influence of post harvest temperature on brown stain of lettuce. J. Am. Soc. Hort. Sci., 98:399.

Brecht, PE, Morris, LL, Cheyney, C, and Janecke, D. 1973c. Brown stain susceptibility of selected lettuce cultivars under controlled atmospheres and temperatures. J. Am. Soc. Hort. Sci. 98(3): 261.

Capon, B and Brecht P. 1970. Variations in seed germination and morphology among populations of *Salvia Columbariae* Benth. in Southern California. California State College, Los Angeles. Aliso 7(2):207.

Gonzalez, AR and Brecht, PE. 1978. Total and reduced ascorbic acid levels in *Rin* and normal tomatoes. J Amer. Soc. Hort. Sci. 103(6):756-758.

Kader, AA, Brecht, PE, Woodruff, R, and Morris, LL. 1973. Influence of carbon monoxide, carbon dioxide and oxygen levels on brown stain respiration rate and visual quality of lettuce. J. Am. Soc. Hort. Sci. 98:485.

Thompson, J.F., P.E. Brecht..2005. Innovations in Transportation, p. 439-445 (Ch. 14). In S. Ben-Yehoshua (ed.). Environmentally Friendly Technologies for Agricultural Produce Quality. 1st editon. Taylor & Francis. New York.

Thompson, J.F., P.E. Brecht, T. Hinsch, A.A. Kader. 2000. Marine Container Transport of Chilled Perishable Produce. University of California Div. of Agricultural & Natural Resources. Pub. No.21595.

Thompson, J.F., P.E. Brecht, T. Hinsch. 2002. Refrigerated Trailer Transport of Perishable Products. University of California Div of Agricultural & Natural Resources. Pub. No. 21614.

Thompson, J.F., C. Bishop, P.E. Brecht. 2004. Air Transport of Perishable Products. University of California Div of Agricultural & Natural Resources. Pub. No. 21618.

Exhibit 2

NYCT Cold Storage Warehouse Stock January through July 2007

<u>Date</u>	January 11, 2007	January 20, 2007	January 25, 2007	January 31, 2007	February 8, 2007
Ship	Atlantic Ocean	Indian Ocean	Arctic Ocean	Atlantic Ocean	Indian Ocean
Day	Thursday	Saturday	Thursday	Wednesday	Thursday
Voyage No.	229	220	225	230	221
Cargo (pallets)	3983	4009	4009	3975	3919
Residual pallets in warehouse (Days)	44	102 (11)	432 (7)	664 (7)	597 (9)
Date	February 16, 2007	February 21, 2007	March 1, 2007	March 7, 2007	March 15, 2007
Ship	Arctic Ocean	Atlantic Ocean	Indian Ocean	Arctic Ocean	Atlantic Ocean
Day	Thursday	Wednesday	Thursday	Wednesday	Thursday
Voyage No.	226	231	222	227	233
Cargo (pallets)	3844	3999	4027	4005	3972
Residual pallets in warehouse (Days)	496 (8)	868 (7)	723 (8)	1137 (7)	713 (8)
Date	March 21, 2007	March 28, 2007	April 6, 2007	April 11, 2007	April 19, 2007
Ship	Indian Ocean	Arctic Ocean	Atlantic Ocean	Indian Ocean	Arctic Ocean
Day	Wednesday	Wednesday	Friday	Wednesday	Thursday
Voyage No.	223	228	233	224	229
Cargo (pallets)	3934	4008	3991	4023	4031
Residual pallets in warehouse (Days)	765 (7)	505 (8)	186 (10)	371 (6)	36 (8)
Date	April 25, 2007	May 3, 2007	May 10, 2007	May 16, 2007	May 23, 2007
Ship	Atlantic Ocean	Indian Ocean	Arctic Ocean	Atlantic Ocean	Indian Ocean
Day	Wednesday	Thursday	Thursday	Wednesday	Wednesday
Voyage No.	234	225	230	235	226

Cargo (pallets)	3986	3954	4036	4002	4044
Residual pallets in warehouse (Days)	127 (7)	81 (8)	27 (8)	38 (7)	113 (8)

<u>Date</u>	May 30, 2007	June 6, 2007	June 14, 2007	June 20, 2007	June 27, 2007
Ship	Planter	Atlantic Ocean	Indian Ocean	Artic Ocean	Atlantic Ocean
Day	Wednesday	Wednesday	Thursday	Wednesday	Friday
Voyage No.	009	236	227	232	237
Cargo (pallets)	3276	3998	4007	3985	3938
Residual pallets in warehouse (Days)	100 (8)	111 (8)	353 (9)	632 (7)	908 (10)
Date	July 5, 2007	July 12, 2007	July 18, 2007	July 27, 2007	
Ship	Indian Ocean	Duncan Island	Atlantic Ocean	Artic Ocean	
Day	Thursday	Thursday	Wednesday	Friday	
Voyage No.	228	139	238	23	
Cargo (pallets)	4016	2165	4006	4028	
Residual pallets in warehouse (Days)	953 (7)	733 (8)	710 (7)	514 (10)	